Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-42 OF 1998
KAMALANATHAN RATNAM J
10 NOVEMBER 1998

Arbitration *— Stay of proceedings — Application — Defendant applied to stay summary proceedings pursuant to arbitration clause — Whether summary proceedings should be heard after disposal of stay proceedings — Whether application for stay should be heard together with application for summary judgment — Arbitration Act 1952 s 6*

Arbitration *— Stay of proceedings — Steps taken in proceedings — Defending application for summary judgment — Whether amount to taking a step in proceedings — Arbitration Act 1952 s 6*

The first defendant and the plaintiff entered into an earthworks contract ('the contract'). The contract contained an arbitration clause which provided that any dispute or difference between the plaintiff and the first defendant arising in connection with the contract shall be referred to and determined by an arbitrator. Due to the first defendant's failure to respond to the plaintiff's request for approval for performance of works exceeding the guarantee sum, the plaintiff gave notice of termination in accordance with the contract. Consequently, the project architect issued a final certificate for RM17,459,445.69 for works done by the plaintiff. Upon the defendant's failure to effect payment, the plaintiff applied for summary judgment against the defendants. The first defendant cross-applied for a stay of the present proceedings on the premise that the matter ought to be referred to arbitration as provided for in the contract. The issue before the court was, when the court is faced with a stay application and an application for summary judgment, which application should be heard first.

Held, allowing the defendant's application:

(1) The application for a stay and an application for summary judgment could not and should not be heard together at the same time (see p 541D–E) . This is because there clearly exists a distinction between the criteria to be applied by the court in its enquiry as regards a dispute in a stay application and application for summary judgment (see p 544D).

(2) In the face of an agreement to arbitrate disputes, the court will generally allow a stay of proceedings pursuant to s 6 of the Arbitration Act 1952 ('the Act') on the basis that effect ought to be given to the express agreement of the parties to arbitrate (see p 542A–B); *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 followed.

(3) An application for a stay of proceedings under s 6 of the Act is available in respect of any matter agreed to be referred to arbitration. Therefore, the only real issue for the court's determination is whether there is a dispute or a difference or a question to be decided, falling within the sphere of the arbitration

clause (see p 542F–G). Thus, to approach the question of whether there was a dispute in a stay application pursuant to s 6 of the Act, from the point of view of whether the defendant has made out a triable issue to defeat an application for summary judgment, is wrong and unacceptable (see pp 542I–543A).

(4) A defendant is required to make an application under s 6 of the Act *before* taking any step in the proceedings. Defending an application for summary judgment was clearly taking a step in the proceedings which would preclude the defendant from reverting to his right to have the matter arbitrated. (see p 544E–F).

[Bahasa Malaysia summary

Defendan pertama dan plaintif telah memasuki satu kontrak kerja tanah ('kontrak tersebut'). Kontrak tersebut mengandungi satu fasal timbang tara yang memperuntukkan bahawa apa-apa pertikaian atau perselisihan antara plaintif dan defendan yang berkaitan dengan kontrak akan dirujuk dan diputuskan oleh seorang penimbang tara. Atas kegagalan defendan untuk memenuhi permintaan plaintif untuk kelulusan bagi kerja-kerja yang dilakukan melebihi jumlah gerenti, plaintif telah memberikan notis pemberhentian menurut kontrak tersebut. Selepas itu, arkitek projek telah mengeluarkan sijil terakhir berjumlah RM17,459,445.69 untuk kerja-kerja yang dilakukan oleh plaintif. Atas kegagalan defendan untuk membayar, plaintiff telah memohon untuk penghakiman terus terhadap defendan-defendan. Defendan pertama juga telah memohon untuk penangguhan prosiding semasa atas dasar bahawa perkara tersebut sepatutnya dirujuk kepada penimbang tara seperti yang diperuntukkan dalam kontrak. Isu di hadapan mahkamah adalah, apabila mahkamah berdepan dengan permohonan penangguhan dan juga permohonan penghakiman terus, permohonan manakah yang perlu didengar dahulu.

Diputuskan, membenarkan permohonan defendan:

(1) Permohonan untuk satu penangguhan dan penghakiman terus tidak dapat dan tidak patut didengar bersama pada masa yang sama (lihat ms 541D–E). Ini adalah kerana terdapat perbezaan jelas antara kriteria yang dipakai oleh mahkamah dalam menghukumi pertikaian dalam satu permohonan penangguhan dan permohonan untuk penghakiman terus (lihat ms 544D).

(2) Atas dasar perjanjian untuk menimbang tara pertikaian, mahkamah akan secara am membenarkan penangguhan prosiding menurut s 6 Akta Timbang Tara 1952 ('Akta tersebut') atas sebab bahawa kesan mestilah diberikan kepada terma nyata perjanjian pihak-pihak untuk menimbang tara (lihat 542A–B); *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 diikut.

(3) Satu pemohonan untuk penangguhan prosiding di bawah s 6 Akta tersebut boleh wujud berkenaan dengan apa-apa perkara yang

telah dipersetujui untuk dirujuk kepada penimbang tara. Oleh itu, isu yang sebenar bagi mahkamah untuk membuat keputusan adalah sama ada terdapat apa-apa pertikaian atau perselisihan atau persoalan untuk diputuskan, yang diliputi dalam lingkungan fasal timbang tara (lihat ms 542F–G). Oleh itu, pendekatan kepada persoalan sama ada terdapat pertikaian di dalam permohonan penangguhan berdasarkan s 6 Akta tersebut, dari pandangan sama ada defendan telah menunjukkan sama ada terdapat isu yang perlu dibicarakan untuk menolak permohanan penghakiman terus, adalah salah dan tidak boleh diterima (lihat ms 542I–543A).

(4) Seorang defendan adalah diperlukan untuk memohon di bawah s 6 Akta tersebut *sebelum* mengambil sebarang langkah di dalam prosiding. Mempertahankan permohonan penghakiman terus merupakan langkah jelas dalam prosiding yang boleh menidakkan defendan untuk kembali membangkitkan haknya untuk menimbang tara perkara tersebut (lihat ms 544E–F).]

Notes

For cases on stay of proceedings in an arbitration case, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
Gaya Electric Supply Co Ltd v State of Bihar AIR 1953 SC 182 (refd)
Interscope Versicherung Sdn Bhd v Sime AXA Assurance Bhd [1995] 3 MLJ 661 (refd)
Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (refd)
Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1991] 3 MLJ 309 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)
Seniwisma S & O Akitek Planner v Perusahaan Hiaz Sdn Bhd [1980] 2 MLJ 37 (refd)
SL Sethia Liners Ltd v State Trading Corp of India Ltd [1986] 2 All ER 395 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)

Legislation referred to

Arbitration Act 1952 s 6

CC Choo (*CC Choo & Co*) for the plaintiff.
HL Ooi (*Cheang & Ariff*) for the first defendant.
Logan Sabapathy (*TJ Chin* with him) (*Logan Sabapathy & Co*) for the second defendant.

Cur Adv Vult A

Kamalanathan Ratnam J:

Facts

By an earthworks contract ('the contract') dated 30 October 1996 between the first defendant and the plaintiff, the first defendant engaged the plaintiff B to carry out earthworks for a theme park in Johor known as the Agarta Theme Park. The total contract sum was in the region of RM24.1m. As a collateral for the payment of the works done in pursuance of the contract, the second defendant granted an irrevocable guarantee in favour of the plaintiff up to an aggregate sum of RM15.5m ('the guaranteed sum'). The C contract contained an arbitration clause which required that any dispute or difference between the plaintiff and the first defendant arising in connection with the contract be referred to and determined by an arbitrator. The plaintiff commenced work. It was, inter alia, a term of the contract that if the cost of the earthworks exceeded the guaranteed sum and the excess amount was not secured by any additional guarantee the plaintiff was D entitled to stop the earthworks.

On 3 June 1997, the plaintiff informed the first defendant that the cost of the earthworks done had reached the guaranteed sum and sought approval to perform works exceeding the guaranteed sum. The plaintiff also informed the first defendant that it would stop work if approval and/or the E additional guarantee was not forthcoming. The first defendant did not respond. The plaintiff thus gave notice of termination pursuant to the relevant clause in the contract. Upon the plaintiff complying with the requirements of the contract by delivering to the defendants and to the project architect the required reports, the project architect issued a final certificate for RM17,459,445.69 for works done under the contract. F Although demand has been made, the defendants have failed to effect payment. Hence this suit. The plaintiff has filed an application (encl 8) for summary judgment against the defendants. By way of encl 13, the first defendant seeks to stay the present proceedings on the premise that the matter ought, in accordance with the contract, be referred to arbitration for its resolution. G

The preliminary issue

Both the second defendant and the plaintiff contend by way of a preliminary issue that the plaintiff's application for summary judgment (encl 8) and the first defendant's application for a stay of proceedings (encl 13) ought to be H heard together and that encl 8 be determined first and in respect of any balance in dispute, the matter be referred to arbitration. The first defendant opposes this proposition.

Finding of the court

I

Pivotal to the second defendant's and the plaintiff's stand is the view that the search for the existence of 'a dispute or difference' to be arbitrated in

considering an application for a stay of proceedings under s 6 of the Arbitration Act 1952 ('the Act') is fundamentally the same as the enquiry to be made as to whether there exists a 'defence' or whether there are 'triable issues' in the application for summary judgment.

It is normal that in construction contracts when the contractor files a recovery claim followed immediately by an application for summary judgment, the said application would generally be met by a cross-application from the employer to stay the action pending arbitration. This poses the immediate problem to the court as to which application should be heard first.

The second defendant and the plaintiff rely heavily on the basis that arbitration agreements generally make it a pre-condition of the right to arbitration that there first be 'a dispute or difference' between the parties about a matter covered by the arbitration agreement. Referring to the affidavit evidence of the respective parties, the first defendant argued that it had in its affidavit disputed the plaintiff's claim whereas the plaintiff had in its affidavit contended that 'there is no defence to this action'. Relying on the words of Kerr J in *SL Sethia Liners Ltd v State Trading Corp of India Ltd* [1986] 2 All ER 395, the second defendant described such cross-applications as being 'reverse sides of the same coin'.

In *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459, Peh Swee Chin J (as he then was) held that similar cross-applications could not and should not be heard together at the same time and directed that the application for stay be heard first. I note that the judgment of Kerr J in *SL Setia* was not referred to Peh Swee Chin J. KC Vohrah J also took a similar view in *Interscope Versicherung Sdn Bhd v Sime AXA Assurance Bhd* [1995] 3 MLJ 661. Unfortunately, again neither the decision of Peh Swee Chin J nor the decision of Kerr J was referred to KC Vohrah J by counsel. Whilst it is obvious that the views of these two experienced judges must be given serious consideration, it would have been complete if relevant decisions had been referred to them by counsel for their respective considerations.

Section 6 of the Arbitration Act 1952

Section 6 of the Act reads as follows:

> Power to stay proceedings where there is submission to arbitration
>
> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

It is settled law that in the face of an agreement to arbitrate disputes, the court will generally allow a stay of proceedings pursuant to s 6 of the Act, on the basis that effect ought to be given to the express agreement of the parties to arbitrate. This policy is encapsulated effectively and succinctly by Edgar Joseph Jr SCJ in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 112 when he said:

> ... the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v Harding* (1859) 28 LJ Ex 215:
>
> > 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.'

Therefore, what in essence has been agreed between the parties in an arbitration agreement is that certain identified disputes between them are sought to be determined by a tribunal, other than the court.

I reject the view adopted by Kerr J and adopt the view of Peh Swee Chin J (as he then was) and KC Vohrah J. The view of the second defendant and the plaintiff is that the determination of the existence of a dispute to be referred to arbitration entails an enquiry into whether the alleged dispute is in fact indisputable. It was also submitted that this enquiry may properly be equated to the enquiry undertaken in summary judgment proceedings to discover whether or not a defendant has made out an issue to be tried. It was the case of the second defendant and the plaintiff that once the court decides that the alleged dispute or any part thereof is in fact indisputable, summary judgment ought to be entered for that indisputable part of the plaintiff's claim and the remainder, being the disputed parts be referred to arbitration and hence warranting a stay.

As I had said, this view is flawed. It is clear that an application for a stay of proceedings under s 6 of the Act is available to a defendant 'in respect of any matter agreed to be referred to arbitration'. The essence of an agreement to arbitrate is that when a dispute or difference or question between the parties arise, it would be referred to arbitration for its resolution. However, the exact nature of the dispute, or difference or question would vary from agreement to agreement. It is therefore my judgment that it is in this context that the court is called upon to ascertain whether there is a dispute or a difference or a question to be decided, falling within the arbitration clause (see *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 at p 279 and *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 at p 312).

It is obvious to me that in placing emphasis on the need for there to be a dispute in a stay application pursuant to s 6 of the Act, learned counsel for the second defendant and the plaintiff have perhaps overlooked the fact that it is not the existence of a dispute per se that has to be determined, but the existence of a dispute within the sphere of the arbitration clause.

Thus, it is patently clear that to approach the question of whether there is a dispute in a stay application pursuant to s 6 of the Act, from the point

of view of whether the defendant has made out a triable issue to defeat an application for summary judgment, when viewed against the all important criteria of the dispute having to fall within the agreed scope of the arbitration clause for the purposes of such an application and bearing in mind the predominant public policy of holding parties to their bargain, the earlier view is wrong and unacceptable.

In fact, in comparing the criteria applied by the courts in respect of applications for summary judgments and for stay under s 6 of the Act, it is obvious that there are varying criteria.

In examining the nature of the court's enquiry as regards a dispute in a stay application, Gopal Sri Ram JCA sitting in the Federal Court in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* observed as follows:

(a) Referring to *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd*, he said that the dispute or difference need not be developed nor full blown prior to issuance of the writ to constitute a dispute/difference for the purpose of a s 6 application.

(b) There is no requirement that the dispute or difference be bona fide.

(c) To require the court to ascertain that the dispute was bona fide would inter alia require the court to undertake a critical examination of the merits of the claim and that such an exercise is neither contemplated by the Act nor within the parameters of the court's function under a s 6 application.

(d) With reference to the Indian case of *Gaya Electric Supply Co Ltd v State of Bihar* AIR 1953 SC 182 which considered an application for stay of proceedings under the Indian equivalent of s 6 of the Act he adopted the observation of the learned judge therein, that the validity of either parties' contention in a suit cannot be gone into by the court exercising jurisdiction under a s 6 application, as the only point to be decided 'is whether the claim which is brought — whether it is good, bad or indifferent — comes within the submission to arbitration'.

(e) That the strengths and weaknesses of the issues raised by the defendant must await the decision of the tribunal especially chosen by the parties to decide the differences between them.

(f) Only where it is plain and obvious, without any meticulous examination of the merits, that the dispute alleged by the defendant is frivolous or vexatious may the court be justified in refusing stay.

In summary, the true nature of the enquiry to uncover the existence of a 'matter agreed to be referred to arbitration' in an application for stay of proceedings is to enquire as to what is the alleged dispute or difference and then to look at the words of the arbitration clause to decide whether or not the alleged dispute falls within its terms. There is, pursuant to *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)*, no enquiry to be made into the bona fides of the dispute nor to its strength and weakness.

On the other hand, in respect of an application for summary judgment, the court is merely concerned, in an appropriate case, to see if there is any need to obviate the necessity of a trial and hence not delay judgment for the plaintiff. In such an application the plaintiff has to clearly show that there is no defence to the case at all (see *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85). The court must also look to see if the defence has raised any triable issues. If the issue to be decided rests solely upon a question of law without reference to any fact or where the facts are clear and undisputed and if the court is satisfied that the legal point is unarguable, the court will grant summary judgment (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). In an application for summary judgment, the court is duty bound to consider the bona fides of the claim and whether the issues raised in the defence are meritorious (see *Seniwisma S & O Akitek Planner v Perusahaan Hiaz Sdn Bhd* [1980] 2 MLJ 37). The court is also empowered to grant conditional leave to defend.

That there clearly exists a distinction between the criteria to be applied in respect of both these applications is emphasized by Hashim Yeop Sani CJ in *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 when he said at p 312:

> At the outset it may be observed that the learned judge had to deal with two applications which actually required him to apply different formal criteria. The criteria for the grant of summary judgment and for the grant of a stay are not the same.

There is one other factor that I ought to consider. A defendant is required to make an application under s 6 of the Act *before* taking any step in the proceedings. To my mind, defending an application for summary judgment is clearly taking a step in the proceedings which would preclude the defendant from reverting to his right to have the matter arbitrated. It seems contrary to accepted principle and the provision of s 6 of the Act to require on the one hand that a defendant act with all speed in filing his application for a stay before taking any step in the proceedings, and yet on the other hand to require the same defendant to simultaneously defend an application for summary judgment with vim and vigour.

In the circumstances, I will take the view that when a court is faced with a stay application and an application for summary judgment, the proper course of conduct to adopt would be to hear the stay application first. Finally, I must acknowledge the extensive and illuminating research and arguments of all three counsel. I order that costs be in the cause.

Order accordingly.

Reported by Wong Siok Chin